U.S. Department of Labor

Office of Administrative Law Judges
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Mailed 1/02/01

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IN THE MATTER OF:              *
                               *
Antone W. Cabral, III          *
     Claimant                  *
                               *
          Against              *
                               *
Marisco, Ltd.                  * Case No.: 2000-LHC-0484
     Employer                  *
                               * OWCP No.: 15-043673
          and                  *
                               *
Majestic Insurance Company/          *
Adjusting Services of Hawaii,        *
Inc.                                 *
     Carrier                   *
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APPEARANCES:

Pro Se
For the Claimant

Robert C. Kessner, Esq.
For the Employer/Carrier

BEFORE: **DAVID W. DI NARDI**
Administrative Law Judge

DECISION AND ORDER - DENYING BENEFITS

This is a claim for worker's compensation benefits under the Longshore and Harbor Workers' Compensation Act, as amended (33 U.S.C. §901, **et seq.**), herein referred to as the "Act." The hearing was held on July 10, 2000 in Honolulu, Hawaii, at which time all parties were given the opportunity to present evidence and oral arguments. The following references will be used: TR for the official hearing transcript, ALJ EX for an exhibit offered by this Administrative Law Judge, CX for a Claimant's exhibit and RX for an exhibit offered by the Employer/Carrier.

This decision is being rendered after having given full consideration to the entire record.

Post-hearing evidence has been admitted as:

Exhibit No.	**Item**	**Filing Date**
EX 20A	Attorney Kessner's letter filing a	07/17/00
EX 20	Copy of the June 29, 1999 Form LS-215(a) sent to the Employer/ Carrier by the OWCP relating to the claim herein (this exhibit was admitted into evidence at the hearing.	07/17/00
EX 21	Attorney Kessner's letter filing the	07/31/00
EX 22	July 20, 2000 Authorization For Disclosure and Use of Protected Health Information signed by the Claimant	07/31/00
EX 23	Attorney Kessner's letter filing the	08/10/00
EX 24	August 3, 2000 Affidavit of Jennifer Jerviss-Apo, with attachments "A"-"E"	08/10/00
ALJ EX 12	This Court's ORDER relating to post-hearing evidence	12/04/00
EX 25	Attorney Kessner's letter filing the	12/06/00
EX 26	June 1, 2000 Deposition Testimony of Judd S. See	12/06/00
EX 27	June 1, 2000 Deposition Testimony of Demosthenes D. Angeles, Jr.	12/06/00
EX 28	Motion to Dismiss or, In the Alternative, Motion for Summary Decision	12/06/00

The record was closed on December 6, 2000 upon filing of the official hearing transcript.

Stipulations and Issues

The parties stipulate, and I find:

1. The Act applies to this proceeding.

2. Claimant and the Employer were in an employee-employer relationship at the relevant times.

3. On February 22, 1999, Claimant alleges that he suffered an injury in the course and scope of his employment.

4. The claim for compensation is dated June 21, 1999 and the Respondents' notice of controversion is dated July 6, 1999.

5. The Employer and Carrier have paid not benefits herein.

The unresolved issues in this proceeding are:

1. Whether Claimant sustained an injury on February 22, 1999 in the course of his maritime employment.

2. If so, whether he gave timely notice thereof and timely filed for benefits.

3. If so, the nature and extent of Claimant's disability.

4. Entitlement to interest on any past due compensation.

5. Entitlement to medical benefits.

PROCEDURAL ISSUE

On June 22, 2000 counsel for the Employer/Carrier ("Respondents") filed a **Motion to Dismiss or, in the Alternative, Motion For Summary Decision** on the grounds that Claimant has failed to establish a **prima facie** claim of an injury or, in the alternate, on the grounds that there are no genuine issues of material fact, thereby entitling the Respondents to **Summary Decision** as a matter of law. As Claimant is appearing **Pro Se** and as there was not enough time to rule on the motions prior to the hearing, the motions were taken under advisement until the hearing. I did issue an **ORDER TO SHOW CAUSE** on June 23, 2000 directing Claimant to show cause in explanation of his failure to abide by lawful **ORDERS** of this Court, including his failure to appear for his pre-hearing depositions on April 12, 2000 and June 12, 2000, depositions duly scheduled by the issuance of a valid **Subpoena** by the Respondents. (EX 18)

At the hearing Claimant was administered the witness oath and he admitted he had been served by a deputy sheriff with a subpoena requiring his attendance at a pre-hearing deposition but that he failed to appear because he "lost the subpoena," "couldn't find it," "couldn't remember the date," other than he

knew "it was in June but (he) ...(did not) know what day in June." Claimant did call Attorney Kessner's secretary to ask that the April 12, 2000 deposition be cancelled but he made no similar call about the June 12, 2000 deposition because he did not find the subpoena until June 12th or 13th. (TR 50-53)

As Claimant did not show good cause in explaining his failure to appear at the June 12, 2000 and as he failed to provide this Court and Respondents' counsel with his pre-hearing exchange, as required by this Court's **Notice of Hearing and Pre-Hearing Order** issued on March 7, 2000 (ALJ EX 4) and had the Respondents' motions been filed much earlier before the scheduled hearing, I would have granted those motions.

However, as Claimant is appearing **Pro Se** and as he is entitled to his day in Court, the hearing went forward and I shall now resolve the merits of the claim, especially as the Benefits Review Board looks with disfavor upon granting Summary Decision against a **Pro Se** Claimant, except in rather limited circumstances. (TR 60-61)

SUMMARY OF THE EVIDENCE

Antone W. Cabral, III, who was born on April 23, 1964 and who has a high school education and a varied employment history of manual labor, and who became a longshore worker in 1990 on the docks and waterfront in Honolulu, injured his left knee in 1991 while working for Marisco, Ltd. ("Employer") and he underwent arthroscopic surgery performed by a doctor at the Kaiser Clinic. He was out of work for several years as he stayed home to be a caregiver for his children. He returned to the waterfront in 1997 or 1998 for the Employer, "worked there maybe about a year and then (he) got laid off." He was rehired by the Employer on February 1, 1999 and assigned to work in the tool room as a tool room attendant/driver at Pearl Harbor. (TR 21-25)

According to Claimant, the Employer is an outside contractor specializing in refurbishing military ships and Claimant testified that, during an eight (8) hour work shift, he would spend "about three hours in the tool room and the rest of the day out on the road driving back and forth" between the home base and downtown Honolulu and other supply stores picking up equipment, material and other supplies needed by the Employer. He would also spend about two (2) hours per day operating a forklift. (TR 25-28)

As noted, Claimant was rehired by Employer as a tool room attendant/driver on February 1, 1999. He had been previously employed by Employer on several different occasions with the

last termination from Employer on November 21, 1997 due to a reduction in force.

At Employer's main tool room located at Campbell Industrial Park, Kapolei, Hawaii, Employee's supervisor was Demosthenes Angeles, Jr., Tool Room Foreman. Claimant, however, was on assignment at a on-site tool room, consisting of a 20-foot container located at Pearl Harbor Naval Shipyard where Employer had a contract with the U.S. Navy to repair the **U.S.S. Crommlin**, a 526-foot naval vessel. Claimant's supervisors at Pearl Harbor Naval Shipyard were Judd See, superintendent, and Ian Wood, project manager.

Claimant's duties as a tool room attendant/driver entailed issuing hand tools, supplies, and personal protective equipment (consisting of glasses, earplugs and gloves), maintaining a log of items issued to workers and keeping inventory of equipment and supplies. The tools and supplies for which Claimant was responsible at the on-site tool room included respirators, grinders, rolls of masking tape and electrical tape, needle guns, impact wrenches, gasket punches, electric drills, coveralls, boots, fasteners, light bulbs, air hoses, extension cords and rolls of gasket material. There was no need for a generator for the work on the **U.S.S. Crommlin** at Pearl Harbor Naval Shipyard. The heaviest item at the on-site tool room, with the exception of rolls of gasket weighing approximately 100 pounds which were cut into small pieces for use, was a metal can containing welding rods which weighed approximately 50 pounds. The rods were taken out of the can one by one.

Claimant alleges that he injured his left hand on February 22, 1999, at about 3:00 - 4:00 p.m., when he attempted to lift a brand new roll of fire cloth that he estimated weighed “approximately a little over a hundred pounds or over.” He “lift(ed) it up over (his) head, the thing slip(ped) from (his) hand and landed) on (his) head.” He then “just drop(ped) everything and that’s it. Then after awhile ... (his) other foreman (came) walking in off the ship and (Claimant) let him know. His name was Ian.” There were no witnesses to this incident and Claimant reported the incident to “one of the foreman (sic) down at the job site (because) Judd wasn’t there.” The foreman told Claimant “to sit down and rest (a) little while.” Claimant testified that he “report(ed) it to the main office down at Pearl Harbor.” (TR 28-31)

Claimant continued to work the rest of the week, although experiencing left hand numbness “because they didn’t have (anyone) to fill in (for him in) the tool room and (he) had to get it ready before (he) left on the business trip we (**i.e.** he and his friend) went on” to Dallas. In fact, Claimant believed that he worked a fifteen (15) hour shift on February 22, 1999.

He did not seek medical attention at that time "because they need(ed) (him) at the job site" and because his pain ebbed and flowed. He worked until February 26, 1999 and he and his friend then went on that previously scheduled business trip. He was out of work until March 4, 1999 and, according to Claimant, the Employer knew, as of the date of his February 1, 1999 rehiring, that he would be going away on that trip, Claimant remarking that he had told Jennifer about that trip at the end of the month, that Jennifer told him to make sure that he also advised his foreman, and that he did so advised Junior Angeles about the trip. He last worked for the Employer on February 26, 1999, at which time he was still experiencing left hand numbness and he went on that trip to Dallas. He did not sustain any other injuries while on that trip and he denied Attorney Kessner's opening statement that he had injured himself when he fell off a horse. According to Claimant nothing out of the ordinary happened to him while he was away on that trip. (TR 31-35)

Claimant spent one week in Dallas and, during that time, he called Jennifer from Dallas and asked her to give his paycheck to George Goodwin, Claimant remarking that that was "the only phone call (he) gave Jennifer at that time." When Jennifer asked where he was, "(he) told her (he) was on vacation. And she forgot about the vacation I was mentioning to her earlier in February. And then she told me when you come back I need you to fill our your vacation papers," and Claimant agreed to do so. He had no recall of the particular day on which he made that one telephone call to Jennifer. However, upon his return to Honolulu, the left hand symptoms persisted and he decided to seek medical attention and he went to see his family physician, Dr. Hilarion Dayoan, and he referred Claimant for further evaluation by Dr. Jeffrey Lee, an orthopedic specialist. (TR 35-38)

This closed record reflects that on March 1, 1999 Claimant, in a telephone conversation with Judd See, requested a leave of absence from March 1, 1999 through March 5, 1999 and, according to the **Request for Leave of Absence**, the reason was given as: **Previously scheduled this vacation with my girlfriend to go to the mainland, before I was hired here."** (EX 9) (Emphasis added)

On March 4, 1999 Ms. Jennifer Jerviss-Apo, the Employer's Human Resources Manager, made the following entry in Claimant's personnel file (EX 10):

> **I received a call from Antone Cabral informing me that he had sustained a neck injury, due to being thrown off a horse while on his leave of absence from 3/1 - 3/5/99. He stated that he will not be reporting to work on 3/8/99, that he would be seeing a doctor to follow up on his injuries.**

On March 9, 1999 Claimant telephoned the Employer at 7:20 A.M.
and advised that “he has to take his grandma to the hospital and (that) he himself has a doctor’s app’t.” (Exhibit C)

Dr. Dayoan, who saw Claimant on November 26, 1999, sent the following letter on November 26, 1999 to Claimant’s former attorney (EX 11):

> **As you well know, Mr. Cabral was seen on March 8, 1999 because of numbness of the left arm. There was also pain that radiated to his left chest (wall).**
>
> **Although it was not written on the chart that it was work related, in my opinion, heavy lifting or carrying at work could have resulted in/or worsened any condition as cervical disc herniation, for which he underwent surgical repair by Dr. Jeffrey Lee.**
>
> **If you may any questions or concerns regarding this matter, please call me.**

However, the doctor’s March 8, 1999 chart note reflects only that the symptoms related to numbness in Claimant’s left arm and hand and that he was being referred for an orthopedic evaluation. (**Id.**) Cervical pain was reported to Dr. Dayoan on April 17, 1999 and there apparently is a denial of an injury, if I properly interpret the doctor’s medical shorthand symbol”>”. (**Id.**) Cervical radiculopathy on the left side was the doctor’s assessment. (**Id.**) There are no other progress notes from Claimant’s family physician. (**Id.**)

Dr. Lee, who is Board-Certified in Orthopedic Surgery, examined Claimant on March 13, 1999 and the doctor sent the following letter to Dr. Dayoan (EX 12):

“Thank you for letting me see Mr. Cabral. He is a 34-year-old right-handed, tool room/driver who presents with left shoulder and arm symptoms. He had acute onset of symptoms, in 12/98, without specific injury or other arthralgias. He has pain, which starts from the shoulder and radiates into the left arm. He has numbness in the left hand. His arm feels weak. He has minimal neck pain.

“Electrodiagnostic studies, on 12/19/98, which (were) reported as notable for left C-6 radiculopathy of a mild degree and no evidence of carpal tunnel syndrome.

“PHYSICAL EXAMINATION:

Gait is normal.

Cervical range of motion -- flexion 60, extension 40, rotation 40 and painful, lateral bending 20 degrees.

Left cervical tenderness. Rotator cuff and acromioclavicular joint impingement signs are mildly painful. Internal/external rotation strength is normal. No glenohumeral instability is appreciated. Elbow reflexes are normal. Tinel's and Phalen's signs at the wrists are negative. Wright's and Adson's tests for thoracic outlet are negative.

"IMPRESSION: Right trapezial strain with possible rotator tendinitis.

"DISCUSSION:

I will continue with conservative management. He may benefit from a course of physical therapy focusing on rotator cuff strengthening and stretching. A subacromial injection could also be considered.

"If he does not respond to therapy, then MRI of the shoulder to assess for rotator cuff pathology will be indicated."

On June 7, 1999 Ms. Jerviss-Apo sent the following letter to Dr. Lee (EX 14):

"I am writing to you for confirmation of whether or not the Medical certificate you have provided Mr. Antone Cabral dated 3/09/99 was for a non-work related or a work related injury. Our records showed no indication of the injury being work related, however, we (are) writing to you to confirm this statement.

"I hope to hear from you very soon regarding this matter. Please do not hesitate to call me should you have questions or comments."

Dear Ms. Jerviss-Apo"

No work injury was noted at the time of initial presentation on 3/9/99.

Claimant testified that he delayed seeking medical treatment because he thought that the left arm numbness was due to the way that he slept. According to Claimant, Dr. Lee denied that causation theory and the doctor mentioned that the symptoms could have been caused by lifting something or by having something fall on you. Dr. Lee prescribed pain medication, "gave (him) a note and the same day that he gave (him) the note (Claimant) went down to Marisco's office and gave it to

Jennifer. That note reflects that Claimant was disabled from work. (Exhibit B) And Jennifer told (him), she said, "(you) cannot collect (anything) because (you) only work(ed) there one month." Claimant believes that this conversation occurred on March 4th or 5th. He then went home after telling Jennifer that he was going to wait until he healed. Some time thereafter Claimant received a letter advising him that he had been terminated for "excessive absenteeism." That **Notice of Termination** is dated March 23, 1999. (Exhibit C) (TR 37-40)

Claimant has seen Dr. Lee once each month and the doctor performed fusion surgery on Claimant's neck. He currently takes no pain medication and he still experiences "more pains at night" and he relieves the pain by taking several aspirin. He could not recall his last visit to see Dr. Lee, Claimant remarking that the doctor has suggested by an examination by a "nerve specialist." Claimant's typical day is spent caring at home for his five children, two step children and a granddaughter, and his wife is the sole support of his family. He wants to return to work and he will do so once Dr. Lee releases him to return to work. (TR 40-44)

Claimant who sustained a prior left knee injury while working for the Employer admitted that he knows the Employer's policy requiring all employees to report all injuries, no matter how slight, to their immediate supervisor. (TR 45) Claimant, in response to cross-examination, admitted that he had testified before this Administrative Law Judge that he had injured his left hand while lifting a one hundred pound roll of fire cloth and that he had stated in his June 21, 1999 claim for compensation, **i.e.,** Form LS-203, that he had injured his neck, shoulders and arms while lifting "heavy equipment, boxes (and) generators all alone." (EX 1) Claimant identified the signature on the form as his. (TR 46-47)

Claimant admitted that he worked the rest of the week his full schedule, that he had told Ms. Jerviss-Apo, at the time of rehiring on February 1, 1999, that he would be leaving at the end of the month on a previously scheduled vacation and that he made that one telephone call on March 4th as he was still in Dallas and as he wanted to have a co-worker deposit his pay check into his account. He again denied that he had told Jennifer that he had fallen off a horse, especially as he does not ride horses. He also admitted that he did not tell Ms. Jerviss-Apo about the February 22, 1999 alleged incident "but (he) had told Ian" about it. He also denied telephoning the Employer on March 9th to report that he would not be working because he had to take a relative to the hospital. (TR 47-50)

Claimant admitted that he did not advise Dr. Dayoan that he had been injured at work, and he could not recall what he told

Dr. Lee about the etiology of his symptoms, Claimant remarking, “It’s been a while back.” He also denied having those symptoms in December of 1998, after he had been laid-off by the Employer the prior month. (TR 51-52) He has not looked for work because Dr. Lee has not released him to return to work. (TR 58)

In response to certain testimony of the Claimant that the Employer heard for the first time, the Employer has offered the supplemental affidavit of Ms. Jennifer Jerviss-Apo (EX 24):

Jennifer Jerviss-Apo, being first duly sworn upon oath deposes and says:

1. That Affiant is Jennifer Jerviss-Apo, human resources director for Marisco, Ltd. and an employee of Marisco, Ltd. since October 30, 1991.

2. That Affiant recalls meeting Tammy Cabral, the current wife of Claimant Antone W. Cabral, III in connection with the purchase by Marisco, Ltd. of cellular telephones from Radio Shack where Ms. Cabral worked.

3. That Affiant recalls that Ms. Cabral visited the Marisco, Ltd. office and that Affiant met Ms. Cabral at the Marisco, Ltd. office.

4. That attached hereto as Exhibit "A" and "B", respectively are copies of the Marisco, Ltd. purchase orders dated April 17, 1995 and November 14, 1997 to Radio Shack for the purchase of new cellular telephones.

5. That Affiant has personal knowledge that the cellular phone purchased on November 14,1997 was for Demosthenes Angeles, Jr., tool room supervisor for Marisco, Ltd.

6. That Affiant has a clear memory of having met Ms. Cabral in connection with Marisco, Ltd.'s purchases from Radio Shack.

7. That Affiant believes it was Ms. Cabral who contacted Affiant in late May or early June 1999 to advise that Antone W. Cabral, III was considering filing for workers' compensation benefits.

8. That it was pursuant to Affiant's belief that Ms. Cabral had contacted her that Affiant directed a verbal inquiry to Jeffrey Lee, M.D. on June 7, 1999 and a written inquiry to Dr. Lee on June 7, 1999 inquiring whether Antone W. Cabral, III had reported suffering an industrial accident.

9. That a copy of Affiant's memorandum of a telephone conversation with Dr. Lee is attached as Exhibit "C" and

Affiant's communication to Dr. Lee is attached as Exhibit “D", with Dr. Lee's letter of response dated June 23, 1999 being attached as Exhibit "E".

10. That Affiant did not tell Antone W. Cabral, III that he could not receive workers' compensation benefits because he had worked only one month.

11. That Affiant is aware that employees are entitled to workers' compensation benefits for on-the-job injuries regardless of the length of employment.

FURTHER, Affiant sayeth naught.

On the basis of the totality of this record and having observed the demeanor and heard the testimony of a for-the-most-part credible but obviously poorly-motivated Claimant, I make the following:

Findings of Fact and Conclusions of Law

This Administrative Law Judge, in arriving at a decision in this matter, is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. **Banks v. Chicago Grain Trimmers Association, Inc.**, 390 U.S. 459 (1968), **reh. denied**, 391 U.S. 929 (1969); **Todd Shipyards v. Donovan**, 300 F.2d 741 (5th Cir. 1962); **Scott v. Tug Mate, Incorporated**, 22 BRBS 164, 165, 167 (1989); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Anderson v. Todd Shipyard Corp.**, 22 BRBS 20, 22 (1989); **Hughes v. Bethlehem Steel Corp.**, 17 BRBS 153 (1985); **Seaman v. Jacksonville Shipyard, Inc.**, 14 BRBS 148.9 (1981); **Brandt v. Avondale Shipyards, Inc.**, 8 BRBS 698 (1978); **Sargent v. Matson Terminal, Inc.**, 8 BRBS 564 (1978).

The Act provides a presumption that a claim comes within its provisions. **See** 33 U.S.C. §920(a). This Section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." **Swinton v. J. Frank Kelly, Inc.**, 554 F.2d 1075 (D.C. Cir. 1976), **cert. denied**, 429 U.S. 820 (1976). Claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. **Golden v. Eller & Co.**, 8 BRBS 846 (1978), **aff'd**, 620 F.2d 71 (5th Cir. 1980); **Hampton v. Bethlehem Steel Corp.**, 24 BRBS 141 (1990); **Anderson v. Todd Shipyards**, **supra**, at 21; **Miranda v. Excavation Construction, Inc.**, 13 BRBS 882 (1981).

However, this statutory presumption does not dispense with the requirement that a claim of injury must be made in the first instance, nor is it a substitute for the testimony necessary to establish a "**prima facie**" case. The Supreme Court has held that "[a] **prima facie** 'claim for compensation,' to which the statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." **United States Indus./Fed. Sheet Metal, Inc., v. Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor**, 455 U.S. 608, 615 102 S. Ct. 1318, 14 BRBS 631, 633 (CRT) (1982), **rev'g Riley v. U.S. Indus./Fed. Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). Moreover, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers' Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1318 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). The presumption, though, is applicable once claimant establishes that he has sustained an injury, **i.e.**, harm to his body. **Preziosi v. Controlled Industries**, 22 BRBS 468, 470 (1989); **Brown v. Pacific Dry Dock Industries**, 22 BRBS 284, 285 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56, 59 (1985); **Kelaita v. Triple A. Machine Shop**, 13 BRBS 326 (1981).

To establish a **prima facie** claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm or pain and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. **Kelaita**, **supra**; **Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). Once this **prima facie** case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. **Kier**, **supra**; **Parsons Corp. of California v. Director, OWCP**, 619 F.2d 38 (9th Cir. 1980); **Butler v. District Parking Management Co.**, 363 F.2d 682 (D.C. Cir. 1966); **Ranks v. Bath Iron Works Corp.**, 22 BRBS 301, 305 (1989). Once claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain the burden shifts to the employer to establish that claimant's condition was not caused or aggravated by his employment. **Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to

determine the issue of causation. **Del Vecchio v. Bowers**, 296 U.S. 280 (1935); **Volpe v. Northeast Marine Terminals**, 671 F.2d 697 (2d Cir. 1981). In such cases, I must weigh all of the evidence relevant to the causation issue, resolving all doubts in claimant's favor. **Sprague v. Director, OWCP**, 688 F.2d 862 (1st Cir. 1982); **MacDonald v. Trailer Marine Transport Corp.**, 18 BRBS 259 (1986).

The U.S. Court of Appeals for the First Circuit has considered the Employer's burden of proof in rebutting a **prima facie** claim under Section 20(a) and that Court has issued a most significant decision in **Bath Iron Works Corp. v. Director, OWCP (Shorette)**, 109 F.3d 53, 31 BRBS 19(CRT)(1st Cir. 1997).

In **Shorette**, the United States Court of Appeals for the First Circuit, in whose jurisdiction this case arises, held that an employer need not rule out any possible causal relationship between a claimant's employment and his condition in order to establish rebuttal of the Section 20(a) presumption. The court held that employer need only produce substantial evidence that the condition was not caused or aggravated by the employment. **Id**., 109 F.3d at 56,31 BRBS at 21 (CRT); **see also Bath Iron Works Corp. v. Director, OWCP [Hartford]**, 137 F.3d 673, 32 BRBS 45 (CRT)(1st Cir. 1998). The court held that requiring an employer to rule out any possible connection between the injury and the employment goes beyond the statutory language presuming the compensability of the claim "in the absence of substantial evidence to the contrary." 33 U.S.C. §920(a). **See Shorette,** 109 F.3d at 56, 31 BRBS at 21 (CRT). The "ruling out" standard was recently addressed and rejected by the Court of Appeals for the Fifth and Seventh Circuits as well. **Conoco, Inc. v. Director, OWCP [Prewitt]**, 194 F.3d 684, 33 BRBS 187(CRT)(5th Cir. 1999); **American Grain Trimmers, Inc. v. OWCP**, 181 F.3d 810, 33 BRBS 71(CRT)(7th Cir. 1999); **see also O'Kelley v. Dep't of the Army/NAF**, 34 BRBS 39 (2000); **but see Brown v. Jacksonville Shipyards, Inc.**, 893 F.2d 294, 23 BRBS 22 (CRT)(11th Cir. 1990) (affirming the finding that the Section 20(a) presumption was not rebutted because no physician expressed an opinion "ruling out the possibility" of a causal relationship between the injury and the work).

To establish a **prima facie** case for invocation of the Section 20(a) presumption, claimant must prove that (1) he suffered a harm, and (2) an accident occurred or working conditions existed which could have caused the harm. **See**, **e.g.**, **Noble Drilling Company v. Drake**, 795 F.2d 478, 19 BRBS 6 (CRT) (5th Cir. 1986); **James v. Pate Stevedoring Co.**, 22 BRBS 271 (1989). If claimant's employment aggravates a non-work-related, underlying disease so as to produce incapacitating symptoms, the resulting disability is compensable. **See Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986); **Gardner v. Bath Iron Works Corp.**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981). If employer presents "specific and comprehensive" evidence sufficient to

sever the connection between claimant's harm and his employment, the presumption no longer controls, and the issue of causation must be resolved on the whole body of proof. **See**, **e.g.**, **Leone v. Sealand Terminal Corp.**, 19 BRBS 100 (1986).

Employer contends that Claimant did not establish a **prima facie** case of causation and, in the alternative, that there is substantial evidence of record to rebut the Section 20(a), 33 U.S.C. §920(a), presumption. The Board has held that credible complaints of subjective symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case for Section 20(a) invocation. **See Sylvester v. Bethlehem Steel Corp.**, 14 BRBS 234, 236 (1981), **aff'd**, 681 F.2d 359, 14 BRBS 984 (5th Cir. 1982). Moreover, I may properly rely on a claimant's credible statements to establish that he experienced a work-related harm, if there exists a work accident occurred which could have caused the harm, thereby invoking the Section 20(a) presumption. **See**, **e.g.**, **Sinclair v. United Food and Commercial Workers**, 23 BRBS 148, 151 (1989). Moreover, Employer's general contention that the clear weight of the record evidence establishes rebuttal of the presumption is not sufficient to rebut the presumption. **See generally Miffleton v. Briggs Ice Cream Co.**, 12 BRBS 445 (1980).

The presumption of causation can be rebutted only by “substantial evidence to the contrary” offered by the employer. 33 U.S.C. § 920. What this requirement means is that the employer must offer evidence which completely **rules out the** connection between the alleged event and the alleged harm. In **Caudill v. Sea Tac Alaska Shipbuilding**, 25 BRBS 92 (1991), the carrier offered a medical expert who testified that an employment injury did not “play a significant role” in contributing to the back trouble at issue in this case. The Board held such evidence insufficient as a matter of law to rebut the presumption because the testimony did not completely rule out the role of the employment injury in contributing to the back injury. **See also Cairns v. Matson Terminals, Inc.**, 21 BRBS 299 (1988) (medical expert opinion which did entirely attribute the employee’s condition to non-work-related factors was nonetheless insufficient to rebut the presumption where the expert equivocated somewhat on causation elsewhere in his testimony). Where the employer/carrier can offer testimony which completely severs the causal link, the presumption is rebutted. **See Phillips v. Newport News Shipbuilding & Dry Dock Co.**, 22 BRBS 94 (1988) (medical testimony that claimant’s pulmonary problems are consistent with cigarette smoking rather than asbestos exposure sufficient to rebut the presumption).

For the most part only medical testimony can rebut the Section 20(a) presumption. **But see Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989) (holding that asbestosis causation was not established where the employer demonstrated that 99% of its asbestos was removed prior to the claimant’s employment while the remaining 1% was in an area far removed from the claimant

and removed shortly after his employment began). Factual issues come in to play only in the employee's establishment of the **prima facie** elements of harm/possible causation and in the later factual determination once the Section 20(a) presumption passes out of the case.

Once rebutted, the presumption itself passes completely out of the case and the issue of causation is determined by examining the record "as a whole". **Holmes v. Universal Maritime Services Corp.**, 29 BRBS 18 (1995). Prior to 1994, the "true doubt" rule governed the resolution of all evidentiary disputes under the Act; where the evidence was in equipoise, all factual determinations were resolved in favor of the injured employee. **Young & Co. v. Shea**, 397 F.2d 185, 188 (5th Cir. 1968), **cert. denied,** 395 U.S. 920, 89 S. Ct. 1771 (1969). The Supreme Court held in 1994 that the "true doubt" rule violated the Administrative Procedure Act, the general statute governing all administrative bodies. **Director, OWCP v. Greenwich Collieries**, 512 U.S. 267, 114 S. Ct. 2251, 28 BRBS 43 (CRT) (1994). Accordingly, after **Greenwich Collieries** the employee bears the burden of proving causation by a preponderance of the evidence after the presumption is rebutted.

In the case **sub judice**, Claimant alleges that the harm to his bodily frame, **i.e.**, his cervical, left arm and shoulder problems, resulted from his February 22, 1999 incident at the Employer's facility. However, as the medical evidence offered by the Respondents constitutes substantial evidence rebutting the statutory presumption in Claimant's favor, the presumption falls out of the case, does not control the result and I shall now proceed to weigh and evaluate all of the record evidence herein.

Injury

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. **See** 33 U.S.C. §902(2); **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1312 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). A work-related aggravation of a pre-existing condition is an injury pursuant to Section 2(2) of the Act. **Gardner v. Bath Iron Works Corporation**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385 (1st Cir. 1981); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Januszewicz v. Sun Shipbuilding and Dry Dock Company**, 22 BRBS 376 (1989) (**Decision and Order on Remand**); **Johnson v. Ingalls Shipbuilding**, 22 BRBS 160 (1989); **Madrid v. Coast Marine Construction**, 22 BRBS 148 (1989). Moreover, the employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if

an employment-related injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. **Strachan Shipping v. Nash**, 782 F.2d 513 (5th Cir. 1986); **Independent Stevedore Co. v. O'Leary**, 357 F.2d 812 (9th Cir. 1966); **Kooley v. Marine Industries Northwest**, 22 BRBS 142 (1989); **Mijangos v. Avondale Shipyards, Inc.**, 19 BRBS 15 (1986); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). Also, when claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, employer is liable for the entire disability if that subsequent injury is the natural and unavoidable consequence or result of the initial work injury. **Bludworth Shipyard, Inc. v. Lira**, 700 F.2d 1046 (5th Cir. 1983); **Mijangos**, **supra**; **Hicks v. Pacific Marine & Supply Co.**, 14 BRBS 549 (1981). The term injury includes the aggravation of a pre-existing non-work-related condition or the combination of work- and non-work-related conditions. **Lopez v. Southern Stevedores**, 23 BRBS 295 (1990); **Care v. WMATA**, 21 BRBS 248 (1988).

In the case at bar, the Respondents submit that the Claimant has not established a **prima facie** claim of an injury on February 22, 1999 and in the manner alleged by the Claimant. The Respondents have presented the following evidence in support of their position.

Initially, I note the deposition testimony of Judd See wherein Mr. See testifies at page 15 as follows (EX 26):

"Sometime after Employee was rehired by Employer on February 1, 1999, Employee advised that he would be going to the Mainland with his girlfriend who had won an all expenses paid trip from her company for being its top salesperson. Employee also advised Mr. See that he was taking a previously planned vacation and that it was already arranged:

> Q. Now, there came a point, as I understand it, in February, late in February of 1999, that you became aware that Mr. Cabral was not going to be available for a period of time to work in the tool room.
>
> How did that come about?. What did you learn, Mr. See?
>
> A. [by Mr. See] When he came to Pearl Harbor, I believe after about three or four days, he told me that he was going on vacation and that it was already arranged. I didn't question it, being that I believed when he was hired, maybe that was brought up. It didn't seem practical for anybody to be telling me this unless it was already prearranged. Normally, our vacation starts after a year.
>
> Q. Were you surprised that Mr. Cabral was telling you he was going to be taking a vacation?
>
> A. Well, yeah, because now I needed to find someone else

to run the tool room.

On February 22, 1999, Claimant clocked in at 5:37 a.m. He claimed that at 1:00 p.m. he sustained injury to his neck, loss of motion in his neck, shoulder and arms due to heavy lifting. Claimant worked until 3:32 p.m. based upon his time card. (Exhibit "A") Moreover, Employee continued to work full shifts on Tuesday, February 23, 1999; Wednesday, February 24, 1999; Thursday, February 25, 1999; and Friday, February 26, 1999. At no time did Claimant report having suffered an accident, complain of pain or injury, or in any way demonstrate any limitation from his usual and customary work.

On Monday, March 1, 1999, Claimant failed to report to work. Mr. See contacted Mr. Angeles, who was not aware of any authorized vacation that Claimant was taking, to request a fill-in for Claimant's position. Mr. See also contacted Employer's Human Resources Manager, Jennifer P. Jerviss-Apo, who prepared a request for a leave of absence to document that Claimant had claimed to have had authorized leave when in fact he did not. (**See** Affidavits of Judd See and Jennifer Jerviss-Apo, summarized above.

On Thursday, March 4, 1999, Ms. Jerviss-Apo received a telephone call from Claimant claiming that he was calling from his Mainland vacation and he had sustained a neck injury after being thrown from a horse. He stated he would not be reporting to work on Monday, March 8,1999 because he wanted to see a doctor. (**See** Affidavit of Jennifer Jerviss-Apo.)

Claimant apparently saw Hilarion Dayoan, M.D., on March 8,1999 complaining of left arm and hand numbness for the past week. Dr. Dayoan assessed myositis of the left shoulder to the arm and recommended that he see an orthopedist or a neurologist.

On Tuesday morning, March 9,1999, Claimant called a co-worker, driver Leonette DeCambra, reporting that he would be absent from work to take his grandmother to the hospital and to attend his own medical appointment. Ms. DeCambra advised Employer's office of the call from the Claimant. (**See** Affidavit of Jennifer Jerviss-Apo.)

Claimant was seen by Jeffrey J. K. Lee, M.D. on March 9,1999 upon referral by Dr. Dayoan. Dr. Lee reported that Claimant had an acute onset of left shoulder and arm symptoms in December 1998 without specific injury or other arthralgias. The impression was right trapezial strain with possible rotator cuff tendinitis.

On the following day, Wednesday, March 10, 1999, Claimant delivered to Ms. Jerviss-Apo a medical certificate dated March 9, 1999 from Dr. Lee certifying disability from work pending an evaluation for a herniated disc in the cervical spine. The medical certificate from Dr. Lee stated: "Off work pending MRI to evaluate for herniated disc in neck." (Exhibit "B")

Claimant last worked for Employer on February 26, 1999. On March 23, 1999, Claimant was given a notice of termination of employment for excessive absenteeism. (Exhibit "C")

An LS-203 was filed by Claimant on June 21,1999. (Exhibit "D") An LS-202 was filed by Employer on July 1, 1999. (Exhibit "E") An LS-207 controverting the claim was filed by Employer on July 6, 1999. (Exhibit "F")

Dr. Lee, responding to a letter from Marisco, in his letter dated June 23,1999, stated that no work injury was noted when he initially saw Claimant on March 9,1999. (Exhibit "G")

Mr. See has provided the following affidavit (F):

1. Affiant is the general superintendent of production for Employer, Marisco, Ltd., at Pearl Harbor Naval Shipyard since approximately 1998.

2. Claimant, Antone W. Cabral III, was under Affiant's supervision and Affiant has direct and personal knowledge of Claimant's claim for workers' compensation benefits for an alleged accident of February 22, 1999.

3. Employer's contract with the U.S. Navy was to repair the **U.S.S. Crommlin**, a 526-foot vessel berthed at Pearl Harbor Naval Shipyard.

4. In February 1999 Claimant was permanently assigned by Employer's Tool Room Foreman, Demosthenes Angeles, Jr., to work at a on-site tool room at the Pearl Harbor Naval Shipyard as a tool room attendant.

5. A 20-foot container served as the on-site tool room at Peal Harbor Naval Shipyard and was located 15 feet from a 40-foot container which served as Affiant's office.

6. The duties of a tool room attendant were to issue out personal protective equipment consisting of glasses, earplugs and gloves, maintain a log of items issued to the workers, and keep inventory.

7. Affiant can not recall any need for generators for the repair project of the **U.S.S. Crommlin**.

8. Three or four days after Claimant started work at Pearl Harbor Naval Shipyard, Claimant advised Affiant that he would be going on vacation and that it was already arranged which Affiant believed to mean that Claimant's leave of absence for the trip had been prearranged with Employer when he was hired on February 1, 1999. Claimant, however, did not request a leave of absence from Affiant from March 1, 1999 through March 5,1999.

9. Claimant's time card for the week ending February 28, 1999 indicates he worked from Monday, February 22, 1999 through Friday, February 26, 1999.

10. Employer's policy requires that injuries at work be reported to a supervisor. Claimant did not ever notify Affiant of a work injury or complain of injuries from lifting.

11. Claimant did not report to work on Monday, March 1, 1999. Affiant, therefore, contacted Mr. Angeles regarding a replacement tool room personnel for the tool room at Pearl Harbor Naval Shipyard.

12. Affiant also contacted Ms. Jennifer Jerviss-Apo, Human Resources Manager on March 1, 1999, and advised that Claimant did not show for work.

13. Claimant did not ever return to work after Friday, February 26,1999.

14. On March 4,1999, Affiant received a call from Ms. Jerviss-Apo that Claimant had called from the Mainland and had stated that he had been thrown from a horse and was injured.

FURTHER AFFIANT SAYETH NAUGHT.

Respondents have also offered the Affidavit of Demosthenes D. Angeles, Jr., wherein the affiant states as follows (G):

1. Affiant is the Tool Room Foreman for Employer, Marisco, Ltd. since approximately 1989.

2. Claimant, Antone W. Cabral, III, one of the tool room attendants/drivers under Affiant's supervision and Affiant has personal knowledge of Claimant's claim for workers' compensation benefits.

3. Affiant is in charge of the main tool room for Employer at the work site located at Campbell Industrial Park in Kapolei, Hawaii.

4. When Claimant was rehired by Employer on February 1, 1999, Affiant assigned him to the on-site tool room at the Pearl Harbor Naval Shipyard where Employer had a contract with the U.S. Navy to repair the **U.S.S. Crommlin**. The on-site tool room at the Pearl Harbor Naval Shipyard was a 20-foot container located next to a 40-foot container serving as the office for the project superintendent, Judd See.

5. Claimant's duties as a tool room attendant were to maintain a record of the equipment and supplies issued, distribute and collect tools, order supplies and keep inventory. The tool room contained supplies including nail guns, drills, grinders, drill bits, grinding disks, soapstones, cases of rolls of masking tape and electrical tape, needle guns, impact

wrenches, gasket punches, coveralls, respirators, safety glasses, boots, fasteners, light bulbs, air hoses, extension cords, and gaskets.

6. The heaviest items in the tool room with the exception of the rolls of gasket was a metal can containing welding rods which weighed approximately 50 pounds. The rods were taken out of the can one by one. The gasket, on rolls weighing approximately 100 pounds, was rolled into the tool room by a hand-truck and was cut to size by the worker before taken out from the tool room.

7. Affiant does not recall any generators in the on-site tool room for the repair

8. Employer's policy requires that notice of any work injury be given to a supervisor. Affiant did not receive any notice from Claimant of a work injury he sustained on or about February 22, 1999.

9. Claimant did not ask Affiant for a personal leave of absence from March 1, 1999 through March 5, 1999. A two-week advance notice is required to be given to a supervisor for a leave of absence.

10. Affiant first became aware that Claimant was on a leave of absence when Affiant received a call from Mr. See on Monday, March 1, 1999, advising that Claimant did not report to work. Affiant was asked to provide personnel to fill Claimant's position.

11. Claimant never notified Affiant of a work injury as result of his work as a tool room attendant at the Pearl Harbor Naval Shipyard.

FURTHER AFFIANT SAYETH NAUGHT.

The transcript of the deposition testimony of Mr. Angeles is in evidence as EX 27.

The Respondents have also offered the Affidavit of Ian Wood wherein the affiant states as follows (H):

1. Affiant is the project manager for Employer, Marisco, Ltd., at Pearl Harbor Naval Shipyard since 1997 through 1999.

2. Claimant, Antone W. Cabral III, was under Affiant's supervision and Affiant has personal knowledge of Claimant.

3. Claimant was assigned as a tool room attendant at the on-site tool room for Employer's project at the Pearl Harbor Naval Shipyard to repair the **U.S.S. Crommlin**.

4. Claimant was to report immediately to Affiant or another supervisor should any workplace injury be sustained.

5. To the best of Affiant's knowledge, Claimant did not report any work injury to Affiant.

6. Affiant does not recall any generators for the project on the **U.S.S. Crommlin**.

FURTHER AFFIANT SAYETH NAUGHT.

The Respondents have also offered the Affidavit of Jennifer P. Jerviss-Apo wherein the affiant states as follows (A):

1. Affiant is the Human Resource Manager for Employer, Marisco, Ltd., since 1993.

2. Affiant has personal knowledge of the claim for Longshore and Harbor Workers' Compensation Act benefits filed by Claimant, Antone W. Cabral, 111, for a date of injury of February 22,1999.

3. Sometime after Claimant was rehired by Employer on February 1, 1999, Claimant advised that he would be going to the Mainland with his girlfriend who had won an all-expenses paid trip from her company for being its top salesperson. Claimant, however, did not request a leave of absence from Affiant nor was stich a leave of absence ever approved by Employer.

4. On Monday, March 1, 1999, Affiant was contacted by Mr. Judd See, superintendent of Employer's **U.S.S. Crommlin** repair project at Pearl Harbor Naval Shipyard, who advised that Claimant had failed to report to work. Affiant prepared a Request for Leave of Absence to document that Claimant had claimed to have had authorized leave from March 1, 1999 through March 5, 1999 when, in fact, he did not.

5. On Thursday, March 4,1999, Affiant received a telephone call from Claimant stating that he was calling from the Mainland and that he had sustained a neck injury after being thrown from a horse while on leave of absence. Claimant further stated that he would not be reporting to work on Monday, March 8,1999 as he wanted to see a doctor.

6. Affiant prepared a memorandum dated March 4, 1999 documenting the conversation with Claimant.

7. Affiant immediately contacted Mr. See about the call from Claimant. Affiant also notified Employer's Safety Officer that Claimant had been injured but that it was a non-industrial accident.

8. Claimant's files contain a note that Claimant had telephoned Leonette DeCambra on Tuesday, March 8,1999, advising that he would be absent from work to take his grandmother to the hospital and to attend his own medical appointment.

9. On Wednesday, March 10, 1999, Claimant delivered to Affiant a medical certificate from Jeffrey J. K. Lee, M.D. dated

March 9, 1999, certifying disability from work pending an MRI evaluation of a herniation in the cervical spine.

10. Review of Claimant's personnel files indicates that Claimant last worked for Employer on February 26,1999.

11. On March 23, 1999, Claimant was sent a Notice of Termination for excessive absenteeism.

12. In early June 1999, Affiant received a call from Claimant's girlfriend who advised that Claimant had been thinking about filing a claim for workers' compensation benefits.

13. On June 7, 1999, Affiant wrote to Dr. Lee inquiring as to whether the medical certificate of March 9, 1999 was for a work-related injury. Dr. Lee replied in his letter of June 23, 1999 that, at the time of the initial presentation, no work injury had been noted.

14. On July 1, 1999, an LS-102 was filed in response to Claimant's LS 203 which is dated June 21, 1999. On July 6, 1999, Employer filed an LS-207 controverting the claim for the accident of February 22, 1999.

15. Exhibit "A" is a true and correct copy of a Request for Leave of Absence prepared by Affiant on March 1, 1999.

16. Exhibit "B" is a true and correct copy of a memorandum of a telephone conversation with Claimant dated March 4,1999.

17. Exhibit "C" is a true and correct copy of a memorandum regarding Claimant"s call to Leonette DeCambra on March 9,1999.

18. Exhibit "D" is a true and correct copy of Claimant's Time Card for the week ending February 28, 1999 showing the hours Claimant worked from February 22, 1999 through and including February 26, 1999.

19. Exhibit "E" is a true and correct copy of a Notice of Termination dated March 23, 1999.

20. Exhibit "F" is a true and correct copy of Affiant's letter dated June 7,1999 to Dr. Lee.

21. Exhibit "G" is a true and correct copy of Dr. Lee's response to Affiant dated June 23, 1999.

FURTHER AFFIANT SAYETH NAUGHT.

In view of the foregoing, I find and conclude that Claimant has not established a **prima facie** case of injury, in the manner he has alleged, for the following reasons.

As already noted above, an injury pursuant to Section 2(2) of the Act is defined as accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an Claimant because of his employment.

In order that a claim for injury to be made, however, the Claimant must first establish a **prima facie** case for compensation. To establish a **prima facie** claim, the Claimant has the burden of establishing that

(1) he sustained physical harm or pain; and

(2) an accident occurred in the course of employment, or conditions existed at work which could have caused the harm or pain. **Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984); **Kelaita v. Triple A Mach. Shop**, 13 BRBS 326 (1981), **aff'd sub nom. Kelaita v. Director, OWCP**, 799 F.2d 1308 (9th Cir. 1986).

(1) **Claimant has not established that he sustained a physical harm or pain on February 22, 1999**.

Claimant alleged injury to his neck, shoulders, and arms on February 22, 1999. Employer's policy requires that any work injury be reported to a supervisor. There were, however, no reports of any injury made by Claimant at that time.

Q. He appeared to work seven days during the week of February 21st, with some overtime on Saturday and Sunday.

At any time during that period, Mr. See, did Mr. Cabral report to you suffering any accident of injury?

A. [by Mr. See] No.

Q. Specifically, he's alleging that the accident occurred on the 22nd of February of 1999.

Do you recall him coming to you and saying "I can't do my work" or "I'm hurt" or "I got injured lifting anything"?

A. Nothing.

Q. Nothing whatsoever.

Did Mr. Cabral ever come back to work at the Pearl Harbor tool room after he went on vacation?

A. No.

(EX 26 at 16-17)

Q. Did Mr. Cabral ever report to you that he suffered an accident?

A. [by Mr. Angeles] No, sir.

(EX 27 at 13)

As reflected above, Claimant continued to report for and perform his usual and customary work on February 23, 1999; February 24, 1999; February 25, 1999; and February 26, 1999.

There is no evidence that Claimant suffered physical harm or pain on February 22,1999 as he alleges. Moreover, it was not until March 10, 1999, after Claimant returned from his personal leave of absence, that he delivered a medical certificate from Dr. Lee to Ms. Jerviss-Apo that he was disabled from work. (**See** Affidavit of Jennifer Jerviss-Apo.) The medical certificate did not indicate, however, the nature of the disability nor that the disability was the result of his work. Dr. Lee merely noted, "Off work pending MRI to evaluate for herniated disc in neck."

(2) **Claimant has not established that an accident occurred in the course of employment.**

Claimant took time off from work for a personal leave of absence, missing work from Monday, March 1, 1999 through Friday, March 5, 1999. Claimant called Ms. Jerviss-Apo at Employer's office from the Mainland on March 4, 1999 and advised that he had been thrown from a horse while on leave of absence and would not be reporting to work on March 8, 1999 because he wanted to see a doctor. He did not allege a work injury of any kind at that time.

On the LS-203 dated June 21, 1999, Claimant claimed injury to his "neck, loss of movement in neck and shoulders and arms due to heavy liffing." He noted that the lifting which he did by himself involved heavy equipment, boxes and generators.

Claimant's work as a tool room attendant, however, did not involve lifting of heavy equipment. The tool room contained small hand tools and equipment, the heaviest of which was a small metal can containing welding rods which weighed approximately 50 pounds. The rods were, however, taken out one by one. The rolls of gasket weighed approximately 100 pounds but were cut to size and, when moved, were carried on a handtruck out of the tool room. There were no generators at Employer's Pearl Harbor Naval Shipyard tool room. There was no heavy equipment, including generators, which would require heavy lifting by Claimant as alleged. (**See** Affidavits and deposition testimony of Judd See and Demosthenes Angeles, Jr., summarized above).

Accordingly, in view of the foregoing, I find and conclude that Claimant’s alleged bodily harm to his neck, shoulders and left arm did not result from the alleged February 22, 1999

incident at the Employer's facility because I have found Claimant's testimony (1) less than credible and candid, (2) is contradictory as to which body parts were affected on February 22, 1999, (3) is inconsistent in pertinent parts, as extensively summarized above, and (4) is far outweighed by all of the evidence offered by the Respondents, especially the March 8, 1999 chart note of Dr. Dayoan (EX 11), the March 13, 1999 consultation report of Dr. Lee (EX 12) and the doctor's June 23, 1999 letter to the Employer's representative. (EX 15)

There is simply no credible evidence that Claimant injured himself as he alleges on February 22, 1999 and I have given no weight to Dr. Dayoan's letter of November of 1999 as that letter is not corroborated by his chart notes of March 8, 1999 (EX 11), especially as Claimant could not recall what he told the doctor as to the etiology of his symptoms. Moreover, most noteworthy is Claimant's history report to Dr. Lee on March 13, 1999 that Claimant "had acute onset of symptoms, in December 1998, **without special injury or other arthralgias."** (EX 12) (Emphasis added)

Also, noteworthy is the fact that Claimant had been laid-off in November of 1998 and apparently was not even working in December of 1998. Thus, something happened to Claimant in December of 1998 and he decided to use, as of June 21, 1999 (EX 1), an alleged incident on February 22, 1999 to explain his work absence, especially after he had been terminated on March 23, 1999.

Accordingly, his claim for benefits must be, and the same is hereby **DENIED**.

However, in the event that reviewing authorities should hold as a matter of law, that Claimant has established a **prima facie** claim, the claim must still be denied as Claimant has not complied with the requirements of Section 12(a) of the Act for his alleged traumatic injury.

Timely Notice of Injury

Section 12(a) requires that notice of a traumatic injury or death for which compensation is payable must be given within thirty (30) days after the date of the injury or death, or within thirty (30) days after the Claimant or beneficiary is aware of a relationship between the injury or death and the employment. In the case of an occupational disease which does not immediately result in disability or death, appropriate notice shall be given within one (1) year after the Claimant or claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship among the employment, the disease and the death or disability. Ordinarily, the date on which a claimant was told by a doctor that he had a work-related injury is the controlling date establishing awareness, and a claimant is required in the exercise of reasonable diligence to seek a professional diagnosis only when he has reason to believe that

his condition would, or might, reduce his wage-earning capacity. **Osmundsen v. Todd Pacific Shipyard**, 755 F.2d 730, 732 and 733 (9th Cir. 1985); **see** 18 BRBS 112 (1986) (**Decision and Order on Remand**); **Lindsay v. Bethlehem Steel Corporation**, 18 BRBS 20 (1986); **Cox v. Brady Hamilton Stevedore Company**, 18 BRBS 10 (1985); **Jackson v. Ingalls Shipbuilding Division, Litton Systems, Inc.**, 15 BRBS 299 (1983); **Stark v. Lockheed Shipbuilding and Construction Co.**, 5 BRBS 186 (1976). The relevant inquiry is the date of awareness of the relationship among the injury, employment and disability. **Thorud v. Brady-Hamilton Stevedore Company**, 18 BRBS 232 (1986). **See also Bath Iron Works Corporation v. Galen**, 605 F.2d 583 (1st Cir. 1979); **Geisler v. Columbia Asbestos, Inc.**, 14 BRBS 794 (1981).

As the Employer did not receive written notice of the Claimant's injury or occupational illness as required by Sections 12(a) and (b), the claim is barred because the Employer had no knowledge of Claimant's work-related problem or has offered persuasive evidence to establish it was prejudiced by the lack of written notice. **Sheek v. General Dynamics Corporation**, 18 BRBS 151 (1986) (**Decision and Order on Reconsideration**), **modifying** 18 BRBS 1 (1985); **Derocher v. Crescent Wharf & Warehouse**, 17 BRBS 249 (1985); **Dolowich v. West Side Iron Works**, 17 BRBS 197 (1985). **See also** Section 12(d)(3)(ii) of the Amended Act.

In so concluding, I have rejected Claimant’s inconsistent, contradictory and less-than-candid testimony and I have accepted and credited the evidence presented by the Respondents, as extensively summarized above.

This Administrative Law Judge is presented with the issue of whether Claimant's failure to provide timely notice as required by Section 12(a) is excused under Section 12(d). Section 12(d) specifies the circumstances when failure to give notice under Section 12(a) will not bar a claim. Under Section 12(d) as amended in 1984, 33 U.S.C. §912(d) (Supp. IV 1986), which is applicable to this case, the failure to provide timely written notice will not bar the claim if claimant shows **either** that employer had knowledge during the filing period (subsection 12(d)(1)) **or** that employer was not prejudiced by the failure to give timely notice (subsection 12(d)(2)). **See Sheek v. General Dynamics Corp.**, 18 BRBS 151 (1986), **modifying Sheek v. General Dynamics Corp.**, 18 BRBS 1 (1985).

The Board and the Appellate Courts generally require that in order for the employer to be charged with imputed knowledge under Section 12(d), employer must have knowledge not only of the fact of claimant's injury but also of the work-relatedness of that injury. **See Sun Shipbuilding & Dry Dock Co. v. Walker**, 684 F.2d 266 (3d Cir. 1982), **aff'g** 14 BRBS 132 (1981), **cert. denied**, 459 U.S. 1039 (1982); **Jackson v. Ingalls Shipbuilding Division, Litton Systems, Inc.**, 15 BRBS 299 (1983). The Board and the Courts have also recognized that application of the

Section 12(d) knowledge exception is precluded where, as here, claimant has previously certified on his group health insurance form that his injury was not work-related. **See Januszieicz v. Sun Shipbuilding & Dry Dock Co.**, 677 F.2d 286, 291, 14 BRBS 705, 712 (3d Cir. 1982); **Sun Shipbuilding & Dry Dock Co. v. Walker**, 590 F.2d 73 (3d Cir. 1978), **rev'g** 7 BRBS 134 (1977); **Sheek v. General Dynamics Corp.**, 18 BRBS 1 (1985), (**Decision and Order on Reconsideration**), 18 BRBS 151 (1986). **Cf. Pilkington v. Sun Shipbuilding & Dry Dock Co.**, 14 BRBS 119 (1981).

In the context of the facts of this case, I must reject Claimant's argument that notification of an accident is sufficient. Therefore, the lack of formal notice cannot be excused under Section 12(d)(1). **See Addison v. Ryan-Walsh Stevedoring Company**, 22 BRBS 32, 34 and 35 (1989).

As noted above, the Form LS-203 is dated June 21, 1999 (EX 1) and was served upon the Respondents on June 30, 1999 (EX 20), well over four (4) months after the alleged incident.

Pursuant to Section 12(a), a claimant has thirty (30) days from the alleged injury to provide notice of the injury in a claim such as this one involving a traumatic injury. **Horton v. General Dynamics Corp.**, 20 BRBS 99 (1987). Section 12(d) excuses a claimant's failure to give timely notice if employer had actual knowledge of the injury or death; employer was not prejudiced; or for some reason found satisfactory by this Administrative Law Judge could not be timely given. **Sheek v. General Dynamics Corp.**, 18 BRBS 151 (1986), **modifying Sheek v. General Dynamics Corp.**, 18 BRBS 1 (1985). Employer bears the burden of proving by substantial evidence that it has been unable to investigate effectively some aspect of the claim by reason of the Claimant's failure to provide timely notice as required by Section 12. **Strachan Shipping Co. v. Davis**, 561 F.2d 968, 8 BRBS 161 (5th Cir. 1978), **rev'g**, 2 BRBS 272 (1975); **Williams v. Nicole Enterprises**, 21 BRBS 164 (1988). Although Employer contends that it would be "highly inappropriate" to place this burden upon it, its argument overlooks the fact that Employer is in a far better position than Claimant to know the manner in which it has been prejudiced by Claimant's failure to provide timely notice.

This Administrative also finds that Employer was prejudiced by Claimant's delay in notifying Employer that his back had been injured in the accident because it was unable to determine what immediate back trauma Claimant suffered due to the fall and the extent, if any, to which that trauma contributed to Claimant's present disability. Prejudice is established when the employer demonstrates that due to claimant's failure to provide timely written notice it was unable to effectively investigate to determine the nature and extent of the alleged illness or to provide medical services. **Strachan Shipping Co. v. Davis**, 571 F.2d 968, 972, 8 BRBS 161 (5th Cir. 1978), **rev'g** 2 BRBS 272 (1975); **White v. Sealand Terminal Corp.**, 13 BRBS 1021 (1981).

Since the Employer was not made aware that Claimant's back had been injured until more than two (2) years subsequent to his work-related accident, it was rational for this Administrative Law Judge to conclude that Employer was unable to investigate effectively the circumstances surrounding the injury or to provide medical services. Accordingly, this Administrative Law Judge concludes that Employer was prejudiced by the lack of timely notice from Claimant and Section 12(d)(2) relief is not available to Claimant. **See Bukovi v. Albina Engine/Dillingham**, 22 BRBS 97, 99 (1989); **Addison v. Ryan-Walsh Stevedoring Company**, 22 BRBS 32, 35 (1989).

Claimant has been poorly-motivated to return to work because he is the care giver for eight children and because he apparently is content to remain at home, especially as he has made no effort to return to work.

Accordingly, in view of the foregoing, I find and conclude that this claim must be, and the same hereby is also **DENIED** because of Claimant's failure to comply with the requirements of Section 12(a) of the Act.

ENTITLEMENT

Since Claimant has not established a work-related injury, he is not entitled to benefits in this proceeding and his claim for benefits is hereby **DENIED**. Since any disability Claimant now experiences is due to an independent, subsequent and intervening event, severing the chain of causality or connection between such disability and his previous employment injury, he is not entitled to benefits in this proceeding and his claim for benefits is hereby **DENIED**.

The rule that all doubts must be resolved in Claimant's favor does not require that this Administrative Law Judge always find for Claimant when there is a dispute or conflict in the testimony. It merely means that, if doubt about the proper resolution of conflicts remains in the Administrative Law Judge's mind, these doubts should be resolved in Claimant's favor. **Hodgson v. Kaiser Steel Corporation**, 11 BRBS 421 (1979). Furthermore, the mere existence of conflicting evidence does not, **ipso facto**, entitle a Claimant to a finding in his favor. **Lobin v. Early-Massman**, 11 BRBS 359 (1979).

While Claimant correctly asserts that all doubtful fact questions are to be resolved in favor of the injured Claimant, the mere presence of conflicting evidence does not require a conclusion that there are doubts which must be resolved in claimant's favor. **See Hislop v. Marine Terminals Corp**., 14 BRBS 927 (1982). Rather, before applying the "true doubt" rule, the Benefits Review Board has held that this Administrative Law Judge should attempt to evaluate the conflicting evidence. **See Betz v. Arthur Snowden Co**., 14 BRBS 805 (1981). [Moreover, the U.S. Supreme Court has abolished the "true doubt" rule in **Maher Terminals, Inc. v. Director**, OWCP, 512 U.S. 267, 114 S.Ct. 2251,

28 BRBS 43 (CRT)(1994), aff'g 992 F.2d 1277, 27 BRBS 1 (CRT)(3d Cir. 1993)].

ORDER

It is therefore **ORDERED** that the claim for compensation benefits filed by **Antone W. Cabral, III** shall be, and the same is hereby **DENIED**.

DAVID W. DI NARDI
Administrative Law Judge

Dated: January 2, 2001
Boston, Massachusetts
DWD:dr